

DERTF/Feb 99

SURVEY ON STATE EXPERIENCE WITH INSTITUTIONAL CONTROLS

(Work in Progress)

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States Responding

- California
- Colorado
- North Carolina
- Ohio
- Texas
- Utah
- Washington

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Consult the notes for the text of the Q & A.

Experience of Respondents

- **Average 13 years Environmental Law**
- **Average 7 years Real Property Law**

INDIVIDUAL IC'S

Deed Notices

- **Placed on deed records by landowner (or others?)**
- **Contain information about contaminants, concentrations, locations**
- **Notify public and future owners about risk; may prevent loans**
- **No enforceable requirements**

Deed Notices

Notes, continued.

Deed Restrictions (Restrictive Covenants)

- **Promise between Buyer and Seller concerning use of real property**
- **May be effective without transfer of property interest**
- **May be enforceable by third parties (e.g., state agencies)**
- **Not widely tested in courts**

Deed Restrictions (Restrictive Covenants)

Notes, continued.

Administrative Orders

- **Most states have authority to issue**
- **Generally do not “run with the land”**
- **May have other limitations**

Court Injunctions

- **Effective against named parties**
- **Generally do not “run with the land”**
- **Difficult to cover technical requirements**
- **May adopt agency order**
- **Limited experience**

Environmental Easements

- **Effective against parties in privity; “run with the land”**
- **May not be useful to other parties (or state?)**
- **Hazardous Substance Easements**
- **Uniform Conservation Easement Act**
 - **Not adopted by all states**
 - **Effectiveness against residual contamination unclear**
- **Little experience**

Zoning

- **Depends on local cooperation; State has no control**
- **May be a lack of local enforcement**
- **Little experience**

Zoning

Notes, continued.

Land Use Ordinances

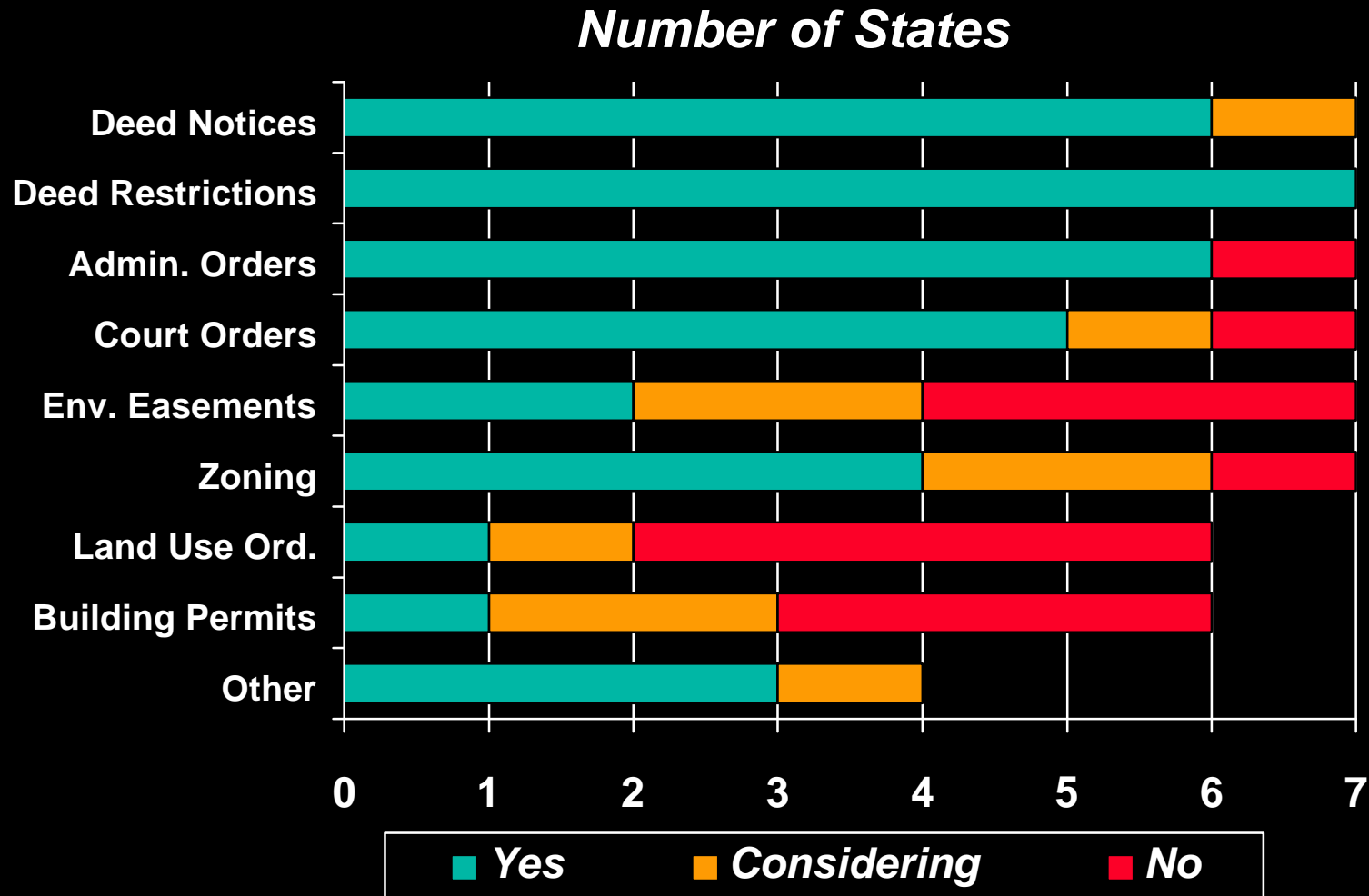
- **Similar to Zoning**

Building Permits

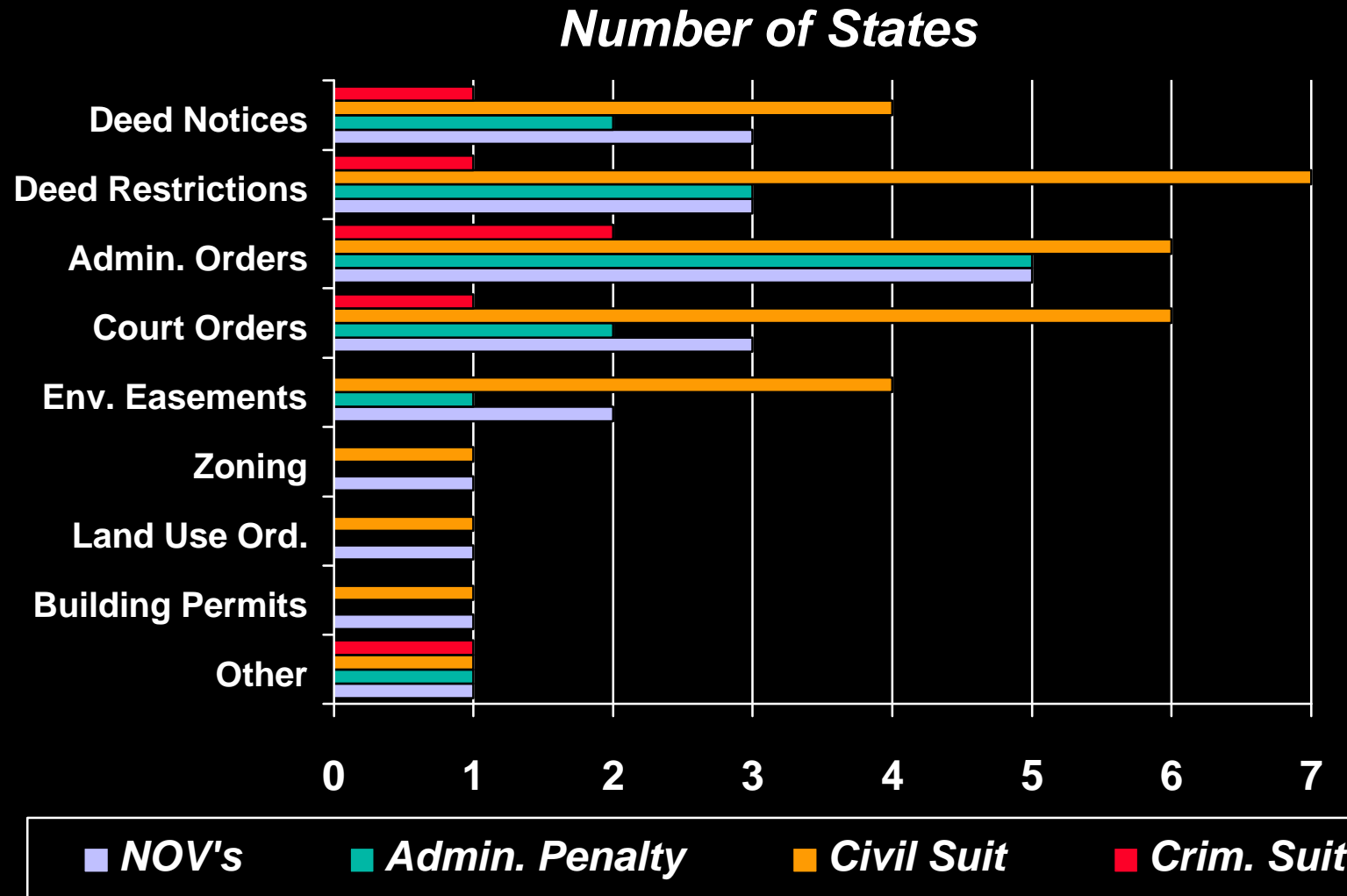
- **Similar to answers on Zoning**
- **One state uses Building Permits to ensure protection of remedies**

COMPARATIVE STATE EXPERIENCE

IC's Used in Environmental Remedies



Means of Enforcing IC's



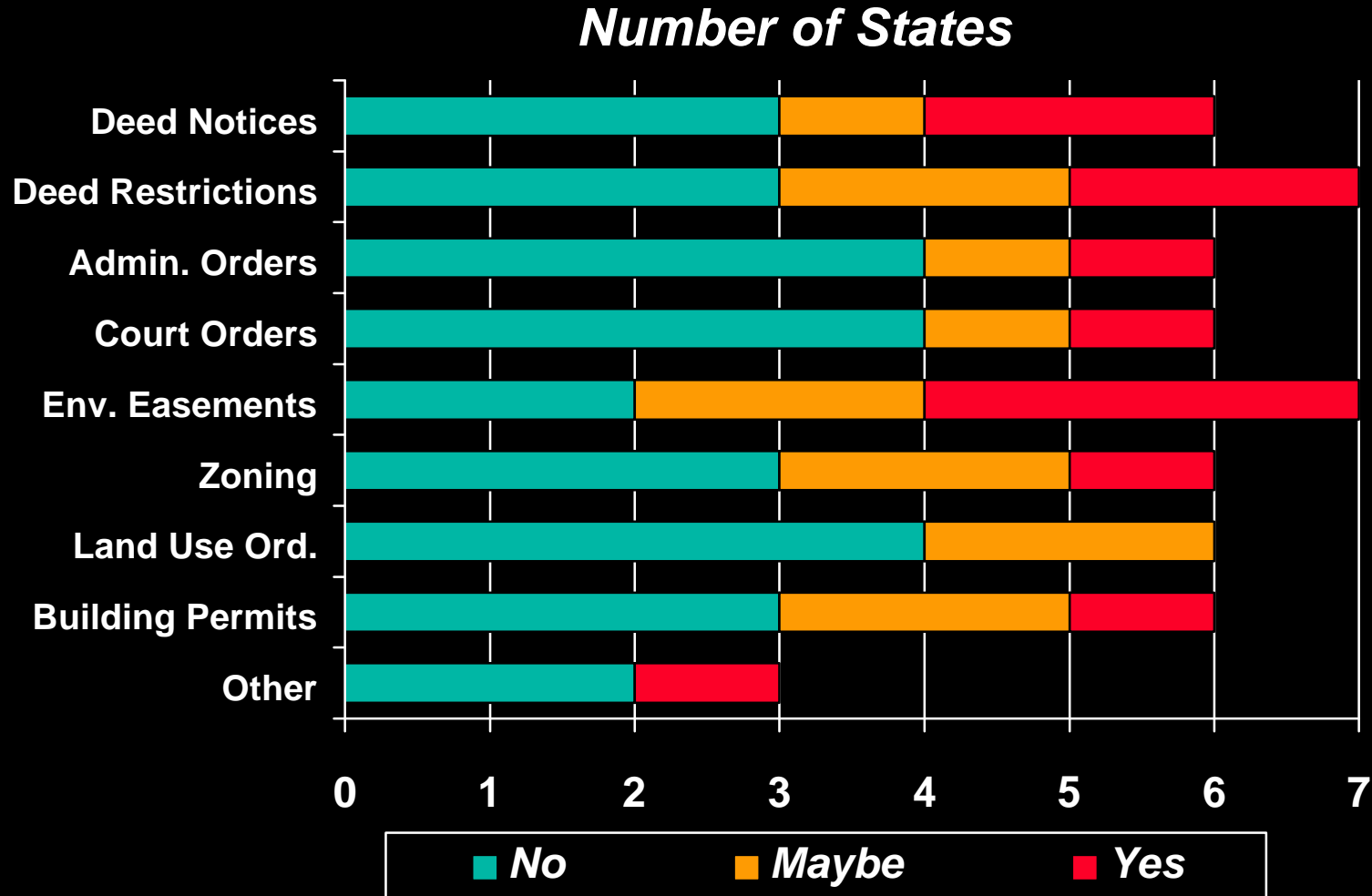
Authority to Enforce IC's

	<u>Enforced by</u>	<u>Authority</u>
<u>Deed Notices</u>	<u>State Agency</u>	
<u>Deed Restrictions</u>	<u>St. Agcy; Landowner</u>	
<u>Admin. Orders</u>	<u>State Agency</u>	
<u>Court Orders</u>	<u>State Agcy; Court</u>	
<u>Env. Easements</u>	<u>State Agcy; Seller</u>	
<u>Zoning</u>	<u>Local Gov't</u>	
<u>Land Use Ord.</u>	<u>“</u>	
<u>Building Permits</u>	<u>“</u>	
<u>Other</u>	<u>Other</u>	
	 <i>Clear</i>	 <i>Unclear</i>  <i>None</i>

Authority to Enforce IC's

Notes, continued.

Limitations on Legal Enforceability



Limitations on Legal Enforceability

Notes, continued.

Public Access to Information on IC's

	<u>Location</u>	<u>Feasibility</u>
<u>Deed Notices</u>	<u>Deed Records</u>	
<u>Deed Restrictions</u>	<u>Deed Records</u>	
<u>Admin. Orders</u>	<u>State Agency</u>	
<u>Court Orders</u>	<u>Court Clerk; AGO</u>	
<u>Env. Easements</u>	<u>Deed Records</u>	
<u>Zoning</u>	<u>City Hall</u>	
<u>Land Use Ord.</u>	<u>City Hall/Courthouse</u>	
<u>Building Permits</u>	<u>City Hall</u>	
<u>Other</u>	<u>Other</u>	
<i>Feasible</i>	<i>Undetermined</i>	<i>Infeasible</i>

Public Access to Information on IC's

Notes, continued.

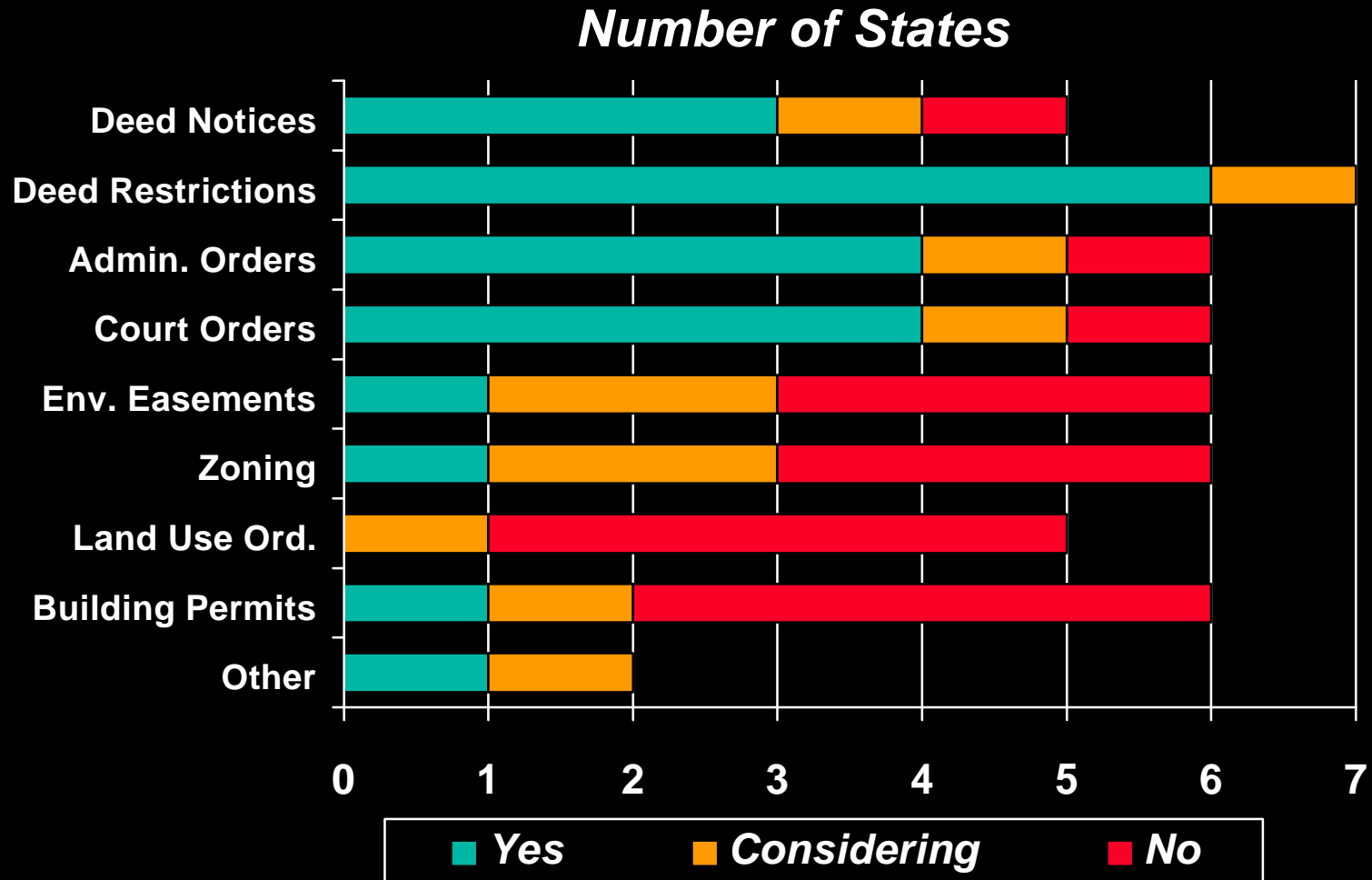
IC's Used Together

- **Admin Orders requiring Deed Restrictions**
- **Admin Orders requiring Deed Recordation**
- **Consent Decrees requiring Restrictive Covenants**
- **Consent Agreements requiring Deed Restrictions**
- **Court or Administrative Orders requiring Deed Restrictions and, where applicable, Long-Term Operation and Maintenance Agreements**
- **Restriction & Easements**
- **Zoning & Restrictions**

IC's Used Together

Notes, continued.

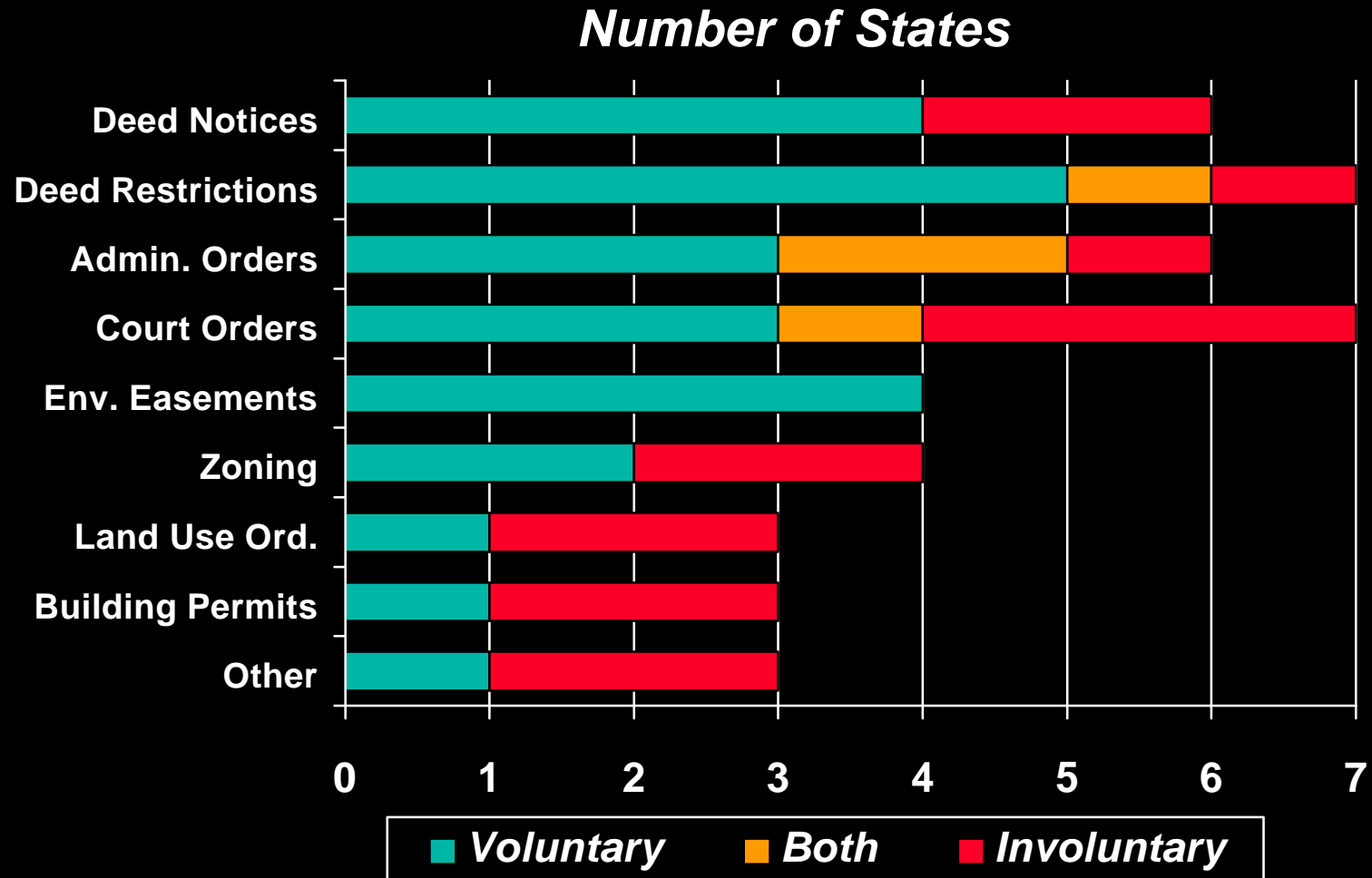
IC's Used with Engineering Controls



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Notes, continued.













IC's Voluntary/Involuntary



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Notes, continued.

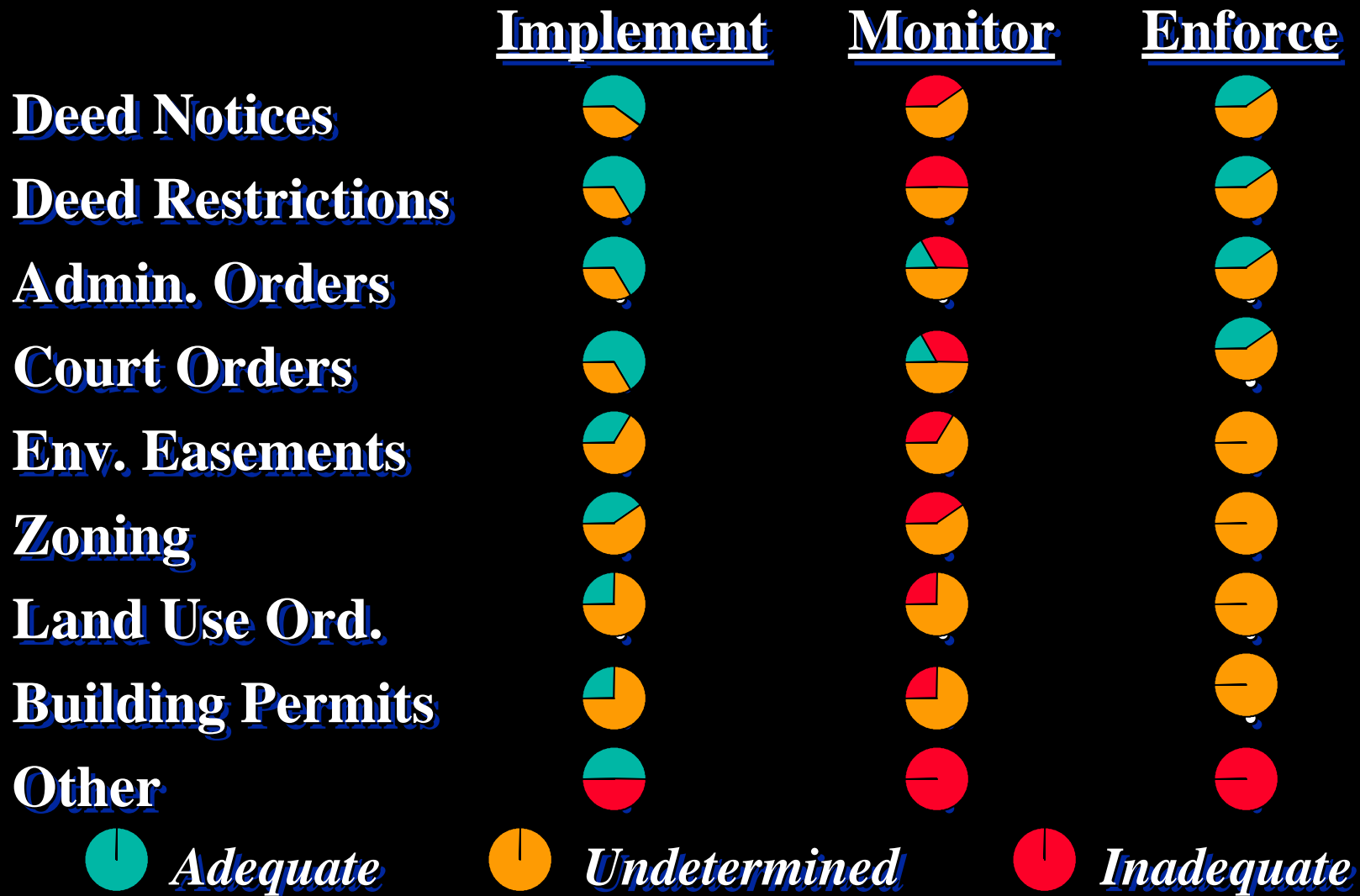
Long-Term Monitoring & Enforcement

	<u>Agency</u>	<u>Adequacy</u>	<u>Reason</u>
Deed Notices	State Agcy		\$ & staff
Deed Restrictions	Resp. Party		“
Admin. Orders	State/EPA		“
Court Orders	“		“
Env. Easements	Resp. Party		“
Zoning	Local Gov't		“
Land Use Ord.	“		“
Building Permits	“		“
Other	State Agcy		“
	 Adequate	 Undetermined	 Inadequate

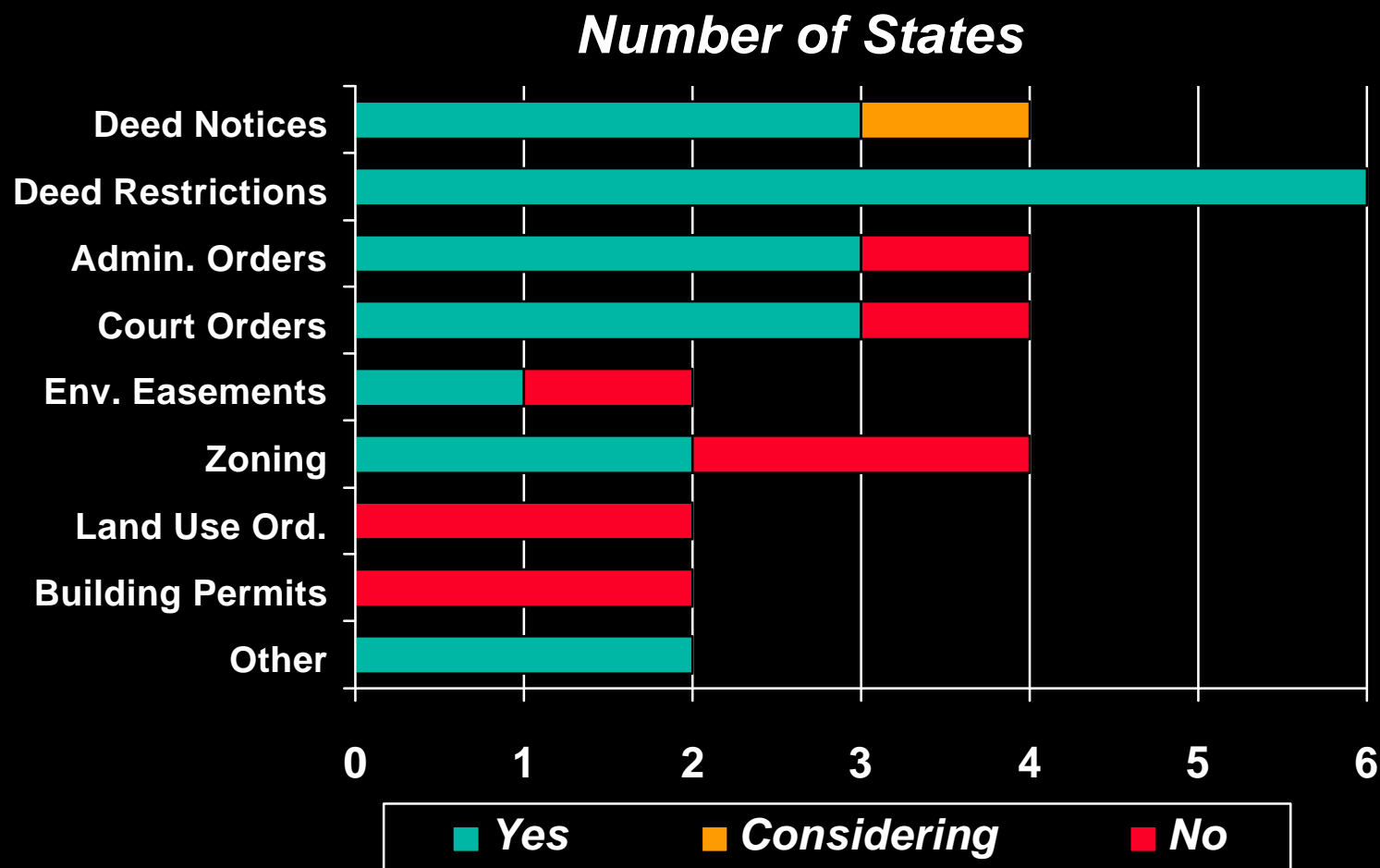
Long-Term Monitoring & Enforcement

Notes, continued.

Adequacy of Funding for IC's



Using IC's to Set Cleanup Levels



Effectiveness of IC's in Setting Cleanup Levels

- Cleanup levels may be based on assumptions about future land use
- IC's may be required to enforce land use
- Inadequate experience in most states to judge effectiveness

IC's at NPL / Non-NPL Sites

- **EPA has to be party to IC negotiations at NPL sites.**
- **Few other differences in IC's at NPL sites versus non-NPL sites.**

Takings

- **IC's do not constitute compensable takings because they are voluntary.**

Conclusions

- **Limited data**
- **IC's have problems of enforceability**
 - Court & admin orders do not run with the land
 - Deed notices, restrictions, & easements have legal limitations (e.g., privity)
 - Local measures uncertain
- **Multiple controls are advisable**
- **Problems with long-term monitoring**

